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*In the Supreme Court of Ohio, January, 1853.*JAMES TEAFF vs. SAMUEL HEWITT, *et al.*

1. A fixture is an article which was a chattel, but which, by being annexed or affixed to the realty, became accessory to it, and parcel of it.
2. The true criterion of a fixture is the united application of the following requisites, to wit: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to the use or purpose to which that part of the realty with which it is connected, is appropriated. 3. The intention of the party making the annexation, to make a permanent accession to the freehold.
3. The criterion of a fixture applicable to machinery in a mill or manufactory, is not different from that which applies to articles affixed to the freehold in any other situation.
4. A mill or manufactory, including all its essential parts, may unite in the same business, and for producing a common result, portions of real estate, with articles of personal property retaining all the essential qualities of chattels.
5. The machinery in a woolen factory, consisting of carding machines, spinning machines, power looms, &c., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats, or other means to confine them to their proper places for use, and subject to removal whenever convenience or business may require without injury, are not fixtures, but chattel property.
6. The legal qualities of articles attached to the realty, may be fixed or ascertained from the agreement and understanding of parties; and a sale and conveyance of a mill or manufacturing establishment *as such*, by any general name, or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not; but otherwise, if the language is merely descriptive of the realty with its appurtenances.

The opinion of the Court in which the facts appear, was delivered by

BARTLEY, C. J.—This is a suit in chancery, instituted by James Teaff, in the Court of Common Pleas of Jefferson County, against Samuel Hewitt and sundry others, as creditors of said Hewitt, for the appraisement and sale of certain mortgaged premises, to satisfy a claim of complaint against Hewitt; and, also, to enjoin sundry judgment creditors of Hewitt, from detaching certain alleged parts of the mortgaged premises, consisting of the machinery of a woolen manufactory, and selling the same on execution as chattel property.

The bill was filed, and an injunction allowed October 1st, A. D. 1849. This injunction was, subsequently, on motion, dissolved.

The mortgage describes the mortgaged premises as "lot No. 322, in Viers' addition to the town of Steubenville, on which is erected a woolen manufactory," and conveys the lot with the appurtenances, &c. The condition of the mortgage was, that if Hewitt paid certain notes when they became due, and kept Teaff from any loss, costs or damages, by reason of the same, then the mortgage to be void, otherwise in full force. And on the day of the execution of this mortgage, it appears that Teaff took a chattel mortgage on the machinery in controversy, which was duly recorded, but not renewed so as to preserve its lien under the statute.

The dissolution of the injunction extended to the machinery, consisting of the carding machines, spinning machines, power looms, and other appendages thereof, which were connected with the motive power of the steam engine by bands and straps, but the injunction was continued as to the steam engine and boilers.

The questions presented by this case for determination, are as follows :

1. Does the appeal from the decree of the August Term, 1850, open up the merits of the case touching the property as to which the injunction had been dissolved ?

2. Was the property, relative to which the injunction was dissolved, parcel of the realty, or was it chattel property ?

3. If the latter, and the property had not diminished in value in consequence of the injunction, but had been, after the dissolution of the injunction, sold on execution, and the proceeds applied on the judgments, were the defendants entitled to any decree against the complainant, for the amount of their judgments and the penalty ?

Of these in their order.

1. An appeal from a decree is nothing else than a proceeding in the original cause, which continues the case by vacating or suspending the decree till the final hearing in the appellate Court. The 55th section of the law of March 10, 1831, directing the mode of proceeding in chancery, 29 O. L. 81, authorized an appeal to the

Supreme Court under the former Constitution of the State, from any final sentence or decree in chancery, in the Court of Common Pleas, on the terms prescribed. A final decree is one which determines and disposes of the whole merits of the cause before the Court, or of a branch of a cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination, so that it will not be necessary to bring the cause, or that separate branch of the cause, again before the Court for further decision. It is true, that after final decree defining and settling the rights of the parties, further orders or decrees may become necessary to carry into effect the rights settled by the final decree, on the merits, such as a decree confirming a sale, or confirming the proceedings or report of a Master, carrying into effect the terms of a final decree. This, however, is a subsequent proceeding, and only auxiliary to or in execution of the final decree, upon the merits of the case. And an appeal from a decree in this subsequent proceeding, brings nothing before the Court, except the proceedings which follow the final determination of the merits. *Hey vs. Schooley, et al*, 7 Ohio Rep. 49; 5 Cranch. 313; 10 Wheat. 442. An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for future determination. Where the further action of the Court is necessary to give the complete relief contemplated by the Court upon the merits, the decree under which the further question arises, is to be regarded not as final, but as interlocutory, *Cocke vs. Gilpin*, 1 Rob. Va. 20.

The case before us presents a double aspect for the subject-matter of a decree. The object of the bill was to settle the mortgaged premises, and apply the proceeds of the sale to the payment of Hewitt's indebtedness to complainant, and also to enjoin the proceedings under the judgments of the other creditors of Hewitt, and prevent the sale of the machinery in the manufactory as chattel property, which the complainant claimed to be a part of the realty, and to be covered by his mortgage. After the dissolution of the injunction, as to all the machinery except the steam engine and boilers, the respondents, who were judgment creditors of Hewitt,

sold the property as to which the injunction was dissolved, on execution, and applied the proceeds on their judgments. At the May Term of the Common Pleas, 1850, Teaff, the complainant, took his decree upon one branch of the case, against Hewitt, for the amount of his debt, with interest and costs of suit, and in default of the payment of the same for the appraisement and sale of the mortgaged premises, including the steam engine and boilers, as to which the injunction had not been dissolved. The decree upon this branch of the case, at that term, was complete and final; no further action of the Court was requisite. The defendants did not appeal from this decree, but acquiesced in it; and this part of the case is not now in controversy, as it appears, between the parties.

But as to the other branch of the case, the Court at that term extended the dissolution of the injunction to the defendants who had answered the bill subsequent to the preceding term, and referred the cause to a Master to take testimony and report under special instructions at the next term, touching the value of the machinery as to which the injunction was dissolved, at the time the injunction was granted: what it would have sold for on execution, had no injunction been granted; whether the same had been sold by the sheriff on execution after the dissolution of the injunction, and if so, upon whose executions, to whom sold, and for what amount, the amount of the judgments enjoined, their priority as to liens, the amount yet due thereon, and the transfers of said judgments, if any, since their renditions, and to whom made, &c. The main question touching the rights of the parties involved in this branch of the case, was left for the future action of the Court on the coming in of the report of the Master. The decision that the steam engine and boilers, as to which the injunction had not been dissolved, were fixtures and covered by the mortgage, and the order for their sale as a part of the mortgaged premises, did not determine the rights of the parties in the property as to which the injunction had been dissolved. That property had been detached and sold on execution prior to this decree, and was not, therefore, in a situation to be appraised and sold under the mortgage, if even it had belonged to the realty. And whether the complainant was in equity entitled

to a decree against the defendants who had caused the property to be sold on execution, or if properly so sold, what decree, if any, the defendants were entitled to against the complainant, was left for future determination. And at the August Term, 1850, the Court determined this branch of the case, by finding that the defendants had not abandoned their levies, and by rendering a decree against the complainant, for the balance on the defendants judgments, with interest and the penalty of five per cent., besides the costs of suit. From this decree, the complainant might well appeal, and the appeal opens up the whole merits touching this branch of the case, at least between him and the judgment creditors.

2. Was the property in controversy covered by the mortgage on the realty, or was it chattel property? This is the main question in the case, and one of great importance.

The bill and answers, which are under oath, furnish the only testimony to be found in the case, as to the nature and description of the property, the mode of its annexation, and the purpose for which it was annexed to the realty, all of which appear in the statement of the case, (but which are here omitted on account of their length, not being deemed essential to an understanding of the case.)

It appears that the boilers were bolted upon timbers which were planted in the earth, with a brick furnace built under them, and adapted to their use; but they rested upon the timbers to which they were bolted, and by which they were supported, rather than upon the brick work. The steam engine was fastened upon timbers which rested for their foundation, on a stone wall laid in the earth. The other machinery, consisting of carding machines, spinning machines, power looms, &c., was connected with the motive power of the steam engine, by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use. It appears from the answers, that such machinery as carding machines and spinning machines and power looms, &c., is generally fastened to the floor by cleats or other similar modes of attachment, for the purpose of keeping the

various parts steady and in a suitable position for use ; but that they are easily detached, as were these, without injury to the machinery itself, or the building ; and that such machinery is usually subject to be removed from one part of the building to another, to suit convenience, and sometimes sold, and other machinery supplied to take its place, whenever the interest of the business for which it is used, may require.

The doctrine of fixtures, by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time, and under a variety of circumstances, and running into numerous complex and conflicting distinctions arising out of the peculiar relation of the parties, and the peculiar circumstances of each particular case, so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

According to the decisions, an article may be a fixture, constituting a part of the realty as between vendor and vendee, which would not, under like circumstances, be such as between landlord and tenant ; so also, an article may be such fixture as between heir and executor, which, under like circumstances of annexation, would not be such as between tenant for life, and the remainderman or reversioner. And also, according to the decisions, an article affixed to the premises for purposes merely agricultural, may pass by a conveyance of the freehold as a fixture, which would not be such fixture under like annexation, if erected or affixed for the purposes of trade or manufacture ; and an article attached to the realty, may be removable at one period of time as a chattel, which, with the same annexation at another period, would not be removable, because it constituted a part of the realty. In some cases, it has been determined that in order to constitute a fixture, the article should be so united by physical annexation to the land, or to some substance previously belonging thereto, that it cannot be detached without injury to the property ; while in other cases, articles have been determined to be fixtures, and as such, to pass

by a conveyance of the freehold, with but a slight attachment to the realty, and in some instances, without any actual, but by simply a constructive attachment.

The term fixture itself, although always applied to articles of the nature of personal property, which have been affixed to land, has been used with different significations, until it has become a term of ambiguous meaning. And this ambiguity, which has attended the use of this word in various adjudications, and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. The term fixture has been used by various writers, and in numerous reported decisions, as denoting personal chattels annexed to land, which may be severed and removed against the will of the owner of the freehold, by the party who has annexed them, or his personal representatives. Amos & Ferard on the Law of Fixtures, 2; Gibbons' Manual of the Law of Fixtures, 2; Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent's Com. 344.

There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life, or years and remainder man or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir, on the death of the owner, may be taken on execution and sold as other chattels, &c. A removable fixture, as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a severance from the land.

It is an ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quicquid plantatur solo solo cedit*, is the language of antiquity in which the maxim has been expressed. The term fixture, in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property, and appears to be not only appropriate, but necessary to distinguish this class of property from movable property possessing the nature and incidents of chattels. It is in this sense that the term is used, in far the greater part of the adjudicated cases. 10 H. 7 pl. 2; Co. Lit. 53, a. 4; Co. 53; 2 Smith's Leading Cases, 114; Chancellor Kent's Note, (a.) 2 Kent's Com. 345; *Dudly vs. Ward*, Amb. 113; *Elwes vs. Maws*, 3 East. 57.

It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.

Amos and Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. (See Amos and Ferard on Fixtures, p. 11.) And they remark: "that it is difficult to determine in which of the above senses it is most frequently employed." This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities, but it would not seem to be needed for any other purpose.

The civil law has been commended for its simple and natural classification of property into the obvious and universal distinction of things movable and things immovable, things tangible and things intangible. Whatever would be movable property by the civil law, would fall under the denomination of chattels personal by the common law. And everything attached to the freehold, *perpetui*

usus causa belonged to the *res immobiles* of the civil law. Taylor's Elements of the Civil Law, 475. This simple division of property seems to be founded in reason and the nature of things.

The great difficulty which has always perplexed investigation upon this subject, has been the want of some certain, settled and unvarying standard, by which it could be determined what amounts to a fixture, or what connexion with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions of things real and things personal, into which the law has classified property; a distinction not merely artificial, but founded on reason and the nature of things—regarding not only the natural qualities of immobility on the one hand, and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

There are some matters having their foundation in things real, which are, nevertheless, by the principals of the common law, attended with some of the qualities of things personal, and therefore termed chattels real, such as estates less than freehold, easements, rents, emblements, &c. These, however, are easily indentified, and have no connection with fixtures. And again, there are others, which, though movable in their nature, and apparently falling within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. Belonging to this class, are heir-looms, and things in the nature of heir-looms, which, by special custom, pass with the inheritance; also, animals *feræ naturæ*, not domesticated so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it,—such as deer in a park, pigeons in a pigeon-house, conies in a warren, fish in a pond, &c.; also, articles sometimes called fixtures, on the principle of constructive attachment, such as the deeds and

other papers which constitute the muniments of title to the land,—the keys of a house, &c., which belong to realty; and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. None of these articles acquire their legal qualities upon the principles of a fixture.

A fixture is an article, which was a chattel, but by being physically annexed or affixed to the realty, became accessory to it and parcel of it. But the precise point in the connection with the realty, where the article loses the legal qualities of the chattel, and acquires those of the realty, often presents a question of great nicety, and sometimes difficult of determination. And a review of the authorities from the time of the year books, down to the present period, does not furnish any one established and certain criterion of universal application, by which this line of demarkation can be clearly ascertained and pointed out. It may, however, be useful in the determination of this case, to examine the authorities, and endeavor to extract from them the most uniform, reasonable and consistent principle, as a standard by which a fixture can be always determined.

If there be any thing well settled in the doctrine of fixtures, it is this, that to constitute a fixture, it is an essential requisite that the article be actually affixed, or annexed to the realty. The term itself imports this. *Walker vs. Sherman*, 20 Wend. 636. But the mode or degree of the annexation which is essential, is a matter about which the authorities are greatly in conflict. Amos and Ferard, in their work above referred to, page 2, lay down the rule as follows: "*It is necessary, in order to constitute a fixture, that the article should be let into or united to the land, or to substances previously connected therewith.*" The manual of Gibbon, and the work of Grady on Fixtures, are to the same effect. And numerous adjudicated cases are referred to by these elementary writers, establishing the same doctrine. A number of the authorities, both English and American, decide that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly affixed to the real estate, that they cannot be removed with-

out injury to the freehold by the act of removal, and apart from the abstraction of the thing removed. *Farrer vs. Chauffeete*, 5 Denio, 337. This doctrine, however, does not furnish a criterion of uniform application, or one which will bear the test of examination. Mill stones in a mill, and even the water wheel, and a great variety of other articles, well established by authority, and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building, by the act of removal. Fences, which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to and in connexion with the land, are yet not let into the ground, or fastened to any thing which is imbedded in the earth. The doors, windows, window shutters, &c., of a mansion house, may be raised and removed without any actual or physical injury, either to the building or to the article removed; so also, in a mill, with the mill stones, hoppers and bolting apparatus, as usually fixed in a mill, yet it has never been questioned that these articles are fixtures.

There is another class of authorities, in which it is laid down that the true test of a fixture is the application of the article to the *use* or *purpose* to which the realty is appropriated, however slight its physical connection with it. *Farrar vs. Stackpole*, 6 Greenleaf, 157; *Gray vs. Holdship*, 17 Serg. and Rawle, 413. And some cases have gone so far as to make this the only test, and even dispense with actual or physical annexation. *Voorhees vs. Freeman*, 2 Watts and Serg. 114; *Pyle vs. Pennock*, Ibid. 391.

This rule is in conflict with those authorities which make the mode of the physical annexation *the test*, and it will not bear examination as a criterion of general application. If adaptation and necessity for the use and enjoyment of the realty, be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subjected to the use of the land, or its appurtenances, which never have been, and never can be recognized as such, would be fixtures. It would utterly confound the rule by which the rights of the vendor and vendee, heir and executor, &c., have been heretofore governed.

In the case of the *Despatch Line vs. Billany*, 12 New Hampshire R. 205, the Court expressed the opinion, that actual annexation to the freehold, and adaptation to its purpose, must both unite, in order to render personal property incident and appurtenant to real estate.

In some of the authorities, the intention of the party making the annexation, is laid down as the true test of a fixture. *Winslow vs. The Merchants Insurance Co.*, 4 Met. R. 306.

Mr. Dane, in his Abridgment of American Law, vol. iii, page 156, remarks: "*It is very difficult to extract from all the cases as to fixtures in the books, any one principle on which they have been decided, though being fixed or fastened to the soil, house or freehold, seems to have been the leading one in some cases, yet not the only one.*" And he adds in reference to this matter: "*Not the mere fixing or fastening is alone to be regarded, but the use, nature and intention.*"

From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion, that the united application of the following requisites will be found the safest criterion of a fixture:

1st. Actual annexation to the reality, or something appurtenant thereto.

2d. Application to the use or purpose of that part of the realty with which it is connected.

3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, the *structure* and *mode* of the annexation, and the *purpose* or *use* for which the annexation has been made.

This criterion furnishes a test of general and uniform application, one by which the essential qualities of a fixture can in most instances be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many

of the cases, but it is believed to be at variance with the conclusion in but few of the well considered adjudications.

Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term fixture; no occasion for denominating an article a fixture at one period of time, which, with the same annexation, would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee, which, under like circumstances, would not be such as between landlord and tenant; or finding that to be a fixture, as between heir and executor, which, under like circumstances of annexation, would not be such as between tenant for life, and remainder-man or reversioner. *Sturges vs. Warren*, 11 Vermont Rep. 433. It is true the time of the annexation, and the relation and situation of the parties, may constitute very important considerations in ascertaining the intention and object in making the annexation. Why is a tenant for life, or for years, or at will, favored with the right of removing articles which he attaches to the land during his term? The Supreme Court of Massachusetts say, in *Whiting vs. Broston*, 4 Pick. 311: "There seems to be no doubt, that according to the later decisions in England, and several cases in our own books, a tenant for life, years, or at will, may, at the expiration of his estate, remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises, or put them in a worse plight than they were in when he took possession." All that is required of a tenant is to leave the land in as good condition as it was when he received it. When, therefore, a tenant erects expensive structures for carrying on his trade or business, which can be removed without their destruction or material injury to the freehold, the presumption is a rational one, that it was not the *intention* of the tenant to make them permanent accessions to the freehold, and thereby donations to the owner of it. The *intention* of the tenant, clearly inferible from his situation and relation to the landlord, is the real foundation of the right of removal, with which he has been favored. It is true other reasons of great subtlety and considerations of public policy have been frequently assigned for this right

of removal, but they are doubtless attributable, in some degree, to a laudable desire on the part of the courts to carry out the real intention of the party.

It is said that the right of removal must be exercised by the tenant before the expiration of his term, or, in some cases, within a reasonable time afterwards; that the tenant can remove things which he has attached to the land for the purposes of trade or manufacture, where not contrary to some prevailing custom, or where it can be done without material and essential injury to the freehold, or where the erections in themselves were strictly chattels in their nature before they were put up, and can be removed without being entirely demolished, or losing their essential character or value. *Amos & Ferard on Fixtures*, pp. 40 and 44. All these circumstances furnish considerations bearing upon the intention of the tenant in making the erections, and their temporary nature and want of adaptation to the permanent use and enjoyment of the freehold, and shows the application of the criterion here adopted.

The rule requiring actual or physical annexation to the realty, is not affected by the few articles sometimes said to belong to the realty upon the principle of constructive annexation, but which, as has already been observed, are not in fact fixtures, but mere incidents to the freehold, and pass with it upon a different principle from that of a fixture. But the extent and mode of the annexation must depend much upon the nature of the article itself, the use to which it is applied, and other attending circumstances.

The rule requiring appropriation to the use or purpose of the realty, was recognised in some of the earliest authorities. In the case of *Lawton vs. Salmon*, 1 H. Black, 259, Lord Mansfield, on a question between heir and executor, respecting salt pans attached to the land, and connected with salt works at a salt spring, declared the articles fixtures, upon the principle that they were accessories to the freehold, and necessary to its use and enjoyment. And it has been adjudged in numerous cases, that where an article attached to the realty is accessory to a matter of a personal nature, it should be considered itself as personalty, and removable as such. *Lawton vs. Lawton*, 3 Atk. 14; *Dudley vs. Ward*, Ambl. 113. Where

articles were attached to the land for the purposes of trade or manufacture, which purposes were considered matters of a personal nature, the articles have been declared not to be fixtures. In the case of *Elwes vs. Mawe*, 3 East. Rep. 54, Lord Ellenborough reviewed the cases from the time of the year books, and came to the conclusion that there was a well founded distinction between articles annexed to the freehold for the purposes of trade or manufacture, and those made for the purposes of agriculture—the right of removal existing to a much greater extent in case of the former than in that of the latter. This distinction, however, has been strongly questioned by high authority in this country. *Van Ness vs. Pacard*, 2 Peters' U. S. Rep. 137; *Whiting vs. Braston*, 4 Pick. 310. It was upon this doctrine, which was recognized by Lord Ellenborough, that the rule was laid down, that articles annexed to the realty for a mixed purpose of the freehold and of personalty, were removable, and not fixtures. Hence it is said that Lord C. B. Comyns, as between heir and executor, decided that a cider mill firmly fixed in the ground was accessory to a species of trade, and, therefore, not a fixture. This distinction, however, as to articles annexed to the realty for a mixed purpose, does not appear to have been consistently recognized in this country.

Numerous exceptions to the rule, that whatever is attached to the realty, becomes a part of it, have been adopted in favor not only of trade and manufacturing, but also in favor of matters of ornamental and domestic use. Some of these exceptions have been based upon public policy, some upon the nature of the article itself, and some upon the ground of the articles being accessory to matters of a personal nature, and not strictly subservient to the use and purposes of the freehold.

But if the third requisite of a fixture here adopted, had been applied in the numerous cases of exceptions in favor of tenants, also, in favor of trade and manufacture, and in favor of matters of ornament and domestic convenience, which fill so much space in the books, there would have been but little difficulty in determining that they were not fixtures. In all these cases denominated exceptions, the article could invariably have been removed without

essential injury to the freehold or the article itself. In no case is a fixture created without the apparent intention of the party making the annexation, to make a permanent accession to the freehold. And whether articles are personal property or fixtures, must be determinable, and plainly appear from an inspection of the property itself, taking into consideration its nature, the mode of the attachment, the purpose for which used, and the relation of the party making the annexation, and in some instances, perhaps, other attending circumstances, indicating either the intention to make it a mere temporary attachment, or an intention to make a permanent accession to the realty. And inasmuch as it requires a positive act on the part of the person making the annexation to change the nature and legal qualities of a chattel into those of a fixture, the intention to make the article a permanent accession to the realty, must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel. In some instances the intention to make the article a fixture, may clearly appear from the mode of the attachment alone; as where a removal cannot be made without serious injury to the property by the act of severance. But, where the attachment is but slight, and does not enter into the physical structure of the realty, this intention must be gathered from the nature of the article and the other attending circumstances.

The criterion of a fixture above mentioned, must, however, be subject to qualification in some respects. Whatever would otherwise be the rights of the parties connected with an article which has been attached to the realty, they are liable to be controlled by an established custom or the special agreement of the parties. The parties are presumed to be cognizant of an existing usage or custom, and to act with a tacit reference to it. And an article attached to the land, may be a fixture or a chattel, according to the special agreement of the parties in relation to it. *Naylor vs. Collings*, 1 Taunt. 19; *Perry vs. Brown*, 2 Stark, 403; *Earl of Mansfield vs. Blackburn*, 6 Bing. N. C. 426.

By an application of the criterion here adopted, to the case

before the Court, there is no difficulty in determining the character of the property in controversy. There was here actual connection with the realty, but it was slight. The bands and straps by which the machinery was attached to the motive power of the steam engine and boilers, could easily be thrown off, and the cleats or means used to keep the machinery steady and in its proper place for use, were such as to admit of its removal without injury to any property, or even inconvenience. The use or purpose to which the machinery was applied, was that of a trade, or the business of manufacturing, in favor of which the authorities have made numerous exceptions to the principle of fixtures. It may be said that the building in which the machinery was placed, was parcel of the freehold, erected and used for the purposes of manufacturing, and that the machinery was accessory to it, and therefore adapted to the use to which that part of the realty with which it was connected, was appropriated. But, in truth, the building itself was rather the accessory than the principal. It was in fact accessory to the business or pursuit carried on by the machinery within it, and if not firmly affixed to or founded in the earth in such manner as to show it to be a permanent structure, and intended for a permanent appropriation of that part of the land to which it was attached, it would be movable property itself. This is supported by high authority; see *Elwes vs. Mawe*, 3 East. 38, and cases there referred to. The business of manufacturing, it has been said, is a pursuit personal in its character, and not strictly subservient to real estate, or essential to the enjoyment of the freehold, or inheritance in land. Upon this ground, arose the distinction for a time recognized by the Courts, between articles for agricultural purposes, or those erected for the purposes of trade or manufacture.

I would not be understood as saying that the use to which the property in controversy in this case was applied, was decisive of its legal character. A manufacturing establishment, including all its essential parts, may unite in the same pursuit, and for producing the same result, portions of real estate with articles of personal property, retaining all the essential qualities of chattels. In the various and complex pursuits of man, real estate and chattels are

very frequently united in their application to the same use, without either being made accessory to the other, while both united are made subservient to one common use or purpose.

That this machinery was not *intended* as a permanent accession to the freehold, and immovable as such, is so clear as scarcely to call for remark. Neither the mode of the annexation nor the use to which it was applied, indicated any design to change the character of the property. The nature of the property itself, the customary removal of it from place to place, its liability to be taken away and disposed of, and other articles of the same kind supplied to take its place, show that it was not intended to be made a permanent accession to the freehold, and therefore was not covered by the mortgage of the complainant.

It has been said that the description in complainant's mortgage, covered this property, even if it were personalty. It is true, that where a manufactory or a mill, is conveyed and delivered, by any general name or description, which embraces all its essential parts, as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not. Thus, things personal in their nature, but fitted and adapted to be used with real estate, and essential to its beneficial enjoyment in such use, may pass with the realty by a conveyance and delivery under such a description, which would not pass by an ordinary conveyance of the land with its appurtenances. But in this case, the language in complainant's mortgage: "*on which is erected a woollen manufactory,*" added to the description of the mortgaged premises by the number of the lot, &c., is descriptive of the realty merely.

It is claimed, on the part of the complainant, that the common law rule as to fixtures has been somewhat changed by the progress of society, and the advancement in the application of machinery to the purpose of manufactures, so as to create a different criterion of a fixture in a manufactory or a mill, from that which applies to articles attached to the realty under other circumstances. And upon this ground, it is claimed that all the essential parts of a mill or manufactory, whether actually attached to the realty or not, become fixtures, and as such, pass by a conveyance of the freehold.

This doctrine, which seems to have been recognized in several of the States, derives its origin chiefly from the cases of *Farrar vs. Stackpole*, 6 Greenleaf's Rep. 154, and *Voorhis vs. Freeman*, 2 Watts & Serg. 116. The former case does not sustain the position assumed. That was trover for a mill chain, dogs and bars attached to a saw mill. The plaintiff claimed the property by virtue of a deed conveying a "*saw mill with the privileges and appurtenances*," upon the grounds: 1st, that the articles, whether chattels or fixtures, formed essential parts of the saw mill, and passed by the sale and conveyance of it as such; and 2d, that they were parts of the saw mill, and went with it by general and uniform usage. The Court below ruled against the plaintiff on the first ground, but left the case on the second ground to the jury, which found for the plaintiff. This judgment was sustained by the Supreme Court, yet expressing an opinion at variance with the Court below, as to the first ground. Although some of the reasoning in this case was intended to show that the articles in question were fixtures, yet all that was settled by the adjudication, was that the articles, whether fixtures or chattels, passed as essential parts of the saw mill, and its appurtenances conveyed as such.

The case of *Voorhis vs. Freeman*, although professedly based on the principle settled in the case in the State of Maine, goes still further, and determines that machinery, which is a constituent part of a manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such manufactory, is part of the freehold, although not actually affixed to it, or in physical connection with it. This case was trover for the conversion of one hundred and six soft and chilled rolls belonging to the machinery of an iron rolling mill in the City of Pittsburg. The plaintiff claimed under a sale on execution as chattel property, and the defendant under a previous sale under a *levari facias* on a mortgage in which the premises were described as "*a lot of ground with one iron rolling mill establishment situate thereon, with the building, apparatus, steam engine, boilers, bellows, &c., attached to the said establishment.*" And the questions simply were, whether the rolls were real or personal property; and if the latter, whether

they did not pass by the descriptive terms of the mortgage. The Court held, that if chattels, the articles would have passed by force of the word "*apparatus*" in the description of the premises. But Chief Justice Gibson, reaching the conclusion, that "*no distinctive principle pervades the cases universally on the subject of fixtures,*" repudiates the criterion of physical attachment as limited in its range, and productive of contradiction, adopts the doctrine of constructive attachment, and attempts to establish a new criterion on the ground of public policy, as applicable to the machinery and implements in a manufactory. The only authority referred to by the learned Chief Justice, which even tends to sustain him, is the case of *Farrar vs. Stackpole*, and instead of explaining how this new class of fixtures is to become incorporated into the realty, and acquire its nature and incidents, he endeavors to maintain his position upon the ground of public policy, holding that it would be "*ruinous to the manufacturer in Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues and profits shall have been found insufficient to satisfy the debt in seven years,*" to allow "a suffering creditor," to seize on execution the loose machinery and implements in a mill, and thus interrupt "*a thriving business,*" Such is the principle of public policy, by which loose and movable property is to be made parcel of the freehold, and subjected to what remains of the more permanent and unbending rules of the feudal tenure. The reasoning of Chief Justice Gibson would be allowable if *legitimate*, but it is not certainly legitimate in settling the incidents of property real or personal, in a Court of justice. Courts have generally declared it to be the policy of the law, to guard against all obstacles in the way of creditors. And this is, perhaps, the first instance in which movable property was, by constructive annexation, adjudged parcel of the realty, for the avowed reason that it ought to be placed beyond the convenient reach of the legal process of creditors.

To what consequences would such a criterion lead, if fully carried out? A cabinet maker erects a building for a cabinet shop, and furnishes it with all the necessary machinery, implements, tools, &c., for an establishment for the manufacture of furniture, some of

which may be attached to the building. All the machinery, tools, implements, &c., whether actually attached to the building or not, and essential and necessary for the business of the establishment to which the building is adapted, and without which it would not be a perfect and complete establishment of the kind, would be parcel of the freehold. The application of the same rule would convert the benches and essential implements of the shoe maker's shop, the vices, hammers and machinery of the copper smith and tinner, and manufacturers, into realty. And inasmuch as some carry on their business on a much larger scale than others, a question of no little difficulty would arise as to the quantity of the loose implements and machinery which should be deemed essential to make it a complete establishment, and what might be rejected as unessential, and therefore chattels.

It may be inconvenient to the mechanic or the manufacturer, to have the movable implements and machinery in his shop taken away upon execution. The same inconvenience, however, may be experienced by the agriculturist, who may be prevented from putting in his crops by a similar removal of his team or farming utensils.

Several decisions have been subsequently made in Pennsylvania, and also in some of the other States, recognizing the doctrine of the case of *Voorhis vs. Freeman*, but the great weight of authority, both in England and in the United States, is against it.

We are told by Lord Hardwicke, in the case of *Lawton vs. Lawton*, 3 Atk. 15, that since the time of Henry the Seventh, the Courts have, from considerations of public policy, been relaxing the strict construction of the law relating to fixtures, and that many articles attached to the realty are now movable, which formerly were considered parcel of the freehold. The progress of society and improvements in business and commerce, have constantly tended to unfetter property, and especially all movable property, from the rigid rules of the feudal tenure. And no sound considerations of public policy can justify any retrograde change in the legal qualities of any kind of movable property by constructive attachment to the freehold, for the purpose of favoring any one particular pursuit or business.

Swift vs. Thompson, 9 Conn. R. 63, is a leading case in Connecticut, in which it was decided that the machinery of a cotton factory, consisting partly of implements in no way attached to the building, and partly of spinning frames standing upon the floor and kept in their places by cleats about their feet, nailed to the floor, and partly of other machinery fastened by wood screws passing into the floor, all of which could be removed without injury to the building or machinery, was personal property.

The case of *Gale vs. Ward*, 14 Mass. R. 352, is a leading case in Massachusetts, in which it was held that carding machines in a woolen factory, not nailed to the floor, nor in any manner attached to the building, except by the leather band which passed over the wheel or pulley to give motion to the machines, which band could be slipped off by hand, and was taken off, and the machines removed from time to time, when repaired, were personal property. Each one of these machines was so heavy as to require four men to move it on the floor, and too large to be taken out at the door, but so constructed as to be easily unscrewed and taken in pieces. In deciding this case, PARKER, Ch. J. said: "*They must be considered as personal property, because, although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true that the relaxation of the ancient doctrine respecting fixtures, has been in favor of tenants against landlords; but the principle is correct in every point of view.*"

It has been said that the authority of this case was somewhat shaken by the case of *Winslow vs. The Merchants' Insurance Company*, 4 Metcalf's R. 306, in which a steam engine, boilers, &c., and other machinery adapted to be moved by them and connected with them, were decided to be fixtures. But from the peculiar structure of this machinery, the mode of its annexation as well as its adaptation to the use of the building, the Court determined that it was permanent in its character, and intended as an accession to the realty. And SHAW, Ch. J., in giving the opinion of the Court, expressly refers to this case of *Gale vs. Ward*, in terms of approval.

In the case of *Cresson vs. Stout*, 17 Johns R. 116, Mr. Justice

PLATT expressed the opinion that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleats nailed to the floor round the feet, would not be considered fixtures.

In *Sturges vs. Warren*, 11 Vermont R. 433, machinery in a woolen factory, affixed to the building in the usual manner, with nails, screws and cleats, was determined to be personal property.

The same principle was settled in *Trapps vs. Harter*, 3 Tyrwhitt's R. 604, and in *Duck vs. Braddyl*, McLelland, 217; 13 Price, 455.

Walker vs. Sherman, 20 Wend. 636, is a leading case in New York, in which it was decided, after a very full review of the authorities, that the removable parts of the machinery of a woolen factory, consisting of two double carding machines, a picking machine, shearing machine, spinning machine, looms, &c., were personal property. In this case, it was conceded that the other machinery of the factory, consisting of the water wheel, fulling mill, dye kettle, press and tenter bars, were fixtures or parcel of the realty.

The recent cases of *Vanderpeel vs. Van Allen*, 10 Bar. S. C. Rep. 157, and *Buckley vs. Buckley et al.*, 11 Bar. S. C. Rep. 43, decided in New York, are not understood as varying the doctrine laid down in the case of *Walker vs. Sherman*, and *Cresson vs. Stout*.

Substantially the same ground has been taken in the State of Indiana. In the case of *Taffe vs. Warwick*, 3 Blackf. 111, it was held that a carding machine situated in a building erected for the purpose of carrying on the carding business, standing on the floor in its usual place of operation, but not fastened to the building, is personal property. And in *Sparks vs. The State Bank*, 7 Blackf. 469, it was held that a steam engine and boiler placed on a stone foundation, with a brick chimney at one end of the boiler, situated in a tan-yard, to facilitate the business of tanning, and used for several years, but not so fixed but that they could be removed without injury to the building, with which they were connected by braces, were fixtures.

Fixtures in a manufacturing establishment, must be governed by

the same criterion which applies to fixtures in other situations. The machinery and implements in such an establishment, although useful and even essential for the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can be easily removed without material injury to the building or the articles themselves, and their place supplied by other articles of a similar kind, are not fixtures, but personal property. But that portion of the machinery in such an establishment which is firmly affixed to the earth, or to the structure of the building, and which, from its nature, mode of attachment, use, and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold.

The question as to the steam engine and boilers, is not directly involved in this case, the Court not being called upon by the defendants to interfere with the judgment of May Term for the sale of the mortgaged premises, from which no appeal was taken. The application of the principle, however, adopted in this case, (in the absence of any established custom or special agreement of the parties to the contrary,) plainly shows these articles to have been fixtures, and therefore parcel of the mortgaged premises. They were bolted and permanently fixed upon timbers, and stone and brick foundations laid in the earth, which were erected for them. The building itself was permanent, and designed and used for a manufactory, and these articles of a ponderous character adapted to the production of the motive power of the establishment, were firmly affixed to the structure of that portion of the freehold appropriated to the purposes of the business, and clearly intended to be permanent. This is sustained by the case of *Allison vs. McCurre*, 15 Ohio Rep. 729, where the Court determined that a steam engine set on timbers laid on raised walls on the top of the ground, was a fixture; and in the same case, the machinery of a grist and saw mill attached by coupling shafts, drivers and straps, shown to be placed there for permanent use, were adjudged to be parcel of the freehold. And to the same effect, is the case of *Powell vs. Monson and Brimfield Manufacturing Company*, 3 Mason's R. 347, in which Mr. Justice Story has elaborately examined the subject of fixtures.

If it were necessary, for the purpose of sustaining the dissolution of the injunction by the Common Pleas, we should further hold that the parties having treated the property in controversy as personalty by the execution of the chattel mortgage and other acts, showing that the articles were not intended to be made fixtures, the complainant could not now have a decree for them as having been parcel of the freehold.

III. The injunction having been properly dissolved as to a part of the property only, and that too which had not diminished in value in consequence of the injunction, and which was sold on execution afterwards, and the proceeds of the sale applied upon the judgments of defendants, no decree should have been rendered against the complainant for the amount of the balance of said judgments at law, and the penalty.

The complainant having properly appealed, it is ordered that the defendants, in whose favor the decree was taken in the Common Pleas, pay the costs accruing on the appeal, and that the cause be remanded.

Roswell Marsh, Attorney for Complainant.

Stanton & McCook, Attorneys for judgment creditors of Hewitt, and *R. S. Moody* for other respondents.

Louisville Chancery Court, Kentucky.

PRAGOFF vs. HESLEP AND OTHERS.

1. Co-owners of Ships and Steamboats. Their liens for sums advanced in payment for the construction of the vessel.
2. If they unite in building the vessel for the purpose of conducting a joint trade, in the carrying or merchandise, passengers, etc., to divide profits and suffer losses as partners do, unless there is some controlling circumstance, each part-owner has a lien on the ship, or steamboat, for such advances; and will have a preference over general creditors of the other part-owners; but not against purchasers of the other's shares, without notice.
3. Remarks on the cases of *Doddington vs. Hallet*, and *Ex parte Young*.
4. Some of the distinctions between partners and part-owners.

The opinion of the Court, in which the facts fully appear, was delivered by

PIRTLE, CH.—This is an attachment sued out by the plaintiff, against the interest of the defendant, Heslep, in the steamboat *Cornelia*. A